UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
DANIEL McGUIRE,

08 Civ. 2049 (SCR)

Plaintiff,

-against-

VILLAGE OF TARRYTOWN, *et al.*,

Defendants.
---X

MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

Plaintiff did not plead that he was a member of a protected class, as required under 42 U.S.C. § 1985. In opposition to a motion premised on that failure to plead, plaintiff plays the shell game and tries to enlarge the definition of § 1985 to include a class of one. In addition, plaintiff's §1986 claim should also be dismissed because plaintiff does not have a viable § 1985 claim. Further, even if this Court should find that plaintiff has adequately pled conspiracy, the claims should still be dismissed based upon the intra-corporate conspiracy doctrine.

Plaintiff's attempt to sling mud on Justice Warhit does not remove this case from the clearly established doctrine of judicial immunity. Justice Warhit is sued plainly for what he did and/or did not do in the performance of his judicial functions; that is the end of the story on this motion.

Plaintiff does nothing, in opposition to the motion, to substantiate a claim against Kevin Barbelet. Inventing a legal theory, plaintiff posits "guilt by familial association." Under this theory, Kevin Barbelet could be liable for being the brother of an arresting officer. Nowhere does plaintiff allege: (a) that Kevin Barbelet *did* anything with regard to plaintiff or (b) facts sufficient to support an ignored obligation to do anything with regard to plaintiff. The law does not permit suits against people based solely upon their last name.

ARGUMENT

POINT I

PLAINTIFF'S §§ 1985 AND 1986 CLAIMS MUST BE DISMISSED.

In an attempt to salvage his 42 U.S.C. §§ 1985 and 1986 claims, plaintiff invokes, for the first time, the language of 42 U.S.C. § 1985(3). In ¶ 27 of the complaint, plaintiff quotes the language of 1985(2). Nowhere in his complaint does plaintiff put defendants on notice that he is also alleging a violation of § 1985(3).

With the exception of clause 1 of § 1985(2), plaintiff can only state a viable cause of action under any section of § 1985 by alleging a deprivation of his rights on account of his membership in a particular class of individuals. Zemsky v. City of New York, 821 F.2d 148, 151 (2nd Cir. 1987). In response to this motion, plaintiff has evidently abandoned any reliance on 42 U.S.C. § 1985(2), training his fire on § 1985(3). It is unavailing.

A conspiracy under § 1985(3) requires an allegation and evidence of class-based discrimination. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-68 (1993); United Bd. of Carpenters & Joiners of Amer. v. Scott, 463 U.S. 825, 834-35 (1983); Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc., 968 F.2d 286, 291 (2d Cir.1992). Although plaintiff attempts to salvage his Section 1985(3) by suggesting he constitutes a "class of one," this tact is unavailing.

Section 1985 does not apply to cases involving an alleged class of one. See, *e.g.*, Rose v. Bethel, 2007 WL 2476389 (S.D.N.Y. 2007); C & H Co. v. Richardson, 78 Fed. Appx. 894, 901-902 (4th Cir.2003); Burns v. State Police Assoc. of Mass., 230 F.3d 8, 12, n. 4 (1st Cir.2000) (same). In order to sustain his "class-of-one" equal protection claim, plaintiff "must show that he was similarly situated to others and received different treatment from them, and was subjected to 'irrational and wholly arbitrary acts' and 'intentional disparate treatment.'" Rose v. Bethel, 2007 WL 2476389 (S.D.N.Y. 2007). Although plaintiff here alleges that he was treated improperly and unfairly, he does not allege that others were treated more favorably than him. Thus, even under a "class of one" theory, his § 1985 claim fails. Rose v. Bethel, 2007 WL 2476389, *id.*

Moreover, it is clear that discrimination against criminal defendants, as a class, is not within the narrow ambit that Congress intended when it enacted § 1985(3) as part of Reconstruction-era legislation. See, e.g., United Bhd of Carpenters, 463 U.S. at 838 (statute does not reach conspiracies motivated by "economic or commercial animus"); Askew v. Bloemker, 548 F.2d 673, 678 (7th Cir.1976) (plaintiffs whose homes were raided by state police could not bring a § 1985(3) suit because they shared no common characteristics prior to the defendants' actions); Sidepockets, Inc. v. McBride, No. 3:03CV742, 2004 WL 555238, at *2 (D.Conn. 2004) (purveyors of adult entertainment are not a cognizable class under § 1985(3)); Parks v. Edwards, No. 03-CV-5588, 2004 WL 377658, at *4 (E.D.N.Y. 2004) (violent offenders are not entitled to claim class-based protection under § 1985(3)).

Because plaintiff does not allege that he was deprived of his rights as a result of any racial, ethnic, or class-based animus on the part of the defendants, the Court should dismiss his claims under §§ 1985 and 1986.

POINT II

JUSTICE BARRY WARHIT IS ENTITLED TO JUDICIAL IMMUNITY.

Plaintiff's opposition is unsuccessful in stripping defendant Justice Warhit of judicial immunity.

Plaintiff posits that Justice Warhit should have recused himself from the criminal trial of plaintiff, in which, according to the complaint, he was acquitted. In the first place, Justice Warhit had no obligation to recuse himself. A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy. N.Y. Jud. L. § 14. Absent a legal requirement that he recuse himself, a County Court Judge in New York is deemed to be "'the sole arbiter' of whether any bias or appearance of bias requires recusal." Hernandez v. Senkowski, 1999 WL 1495443, at *29 (E.D.N.Y. Dec. 29, 1999) (citing People v. Moreno, 70 N.Y.2d 403, 405 (1987); Petkovsek v. Snyder, 251 A.D.2d 1086 (4th Dep't 1998)). New York's Court of Appeals has observed that, absent statutory grounds, a trial judge's alleged bias, prejudice, or unworthy motives will not constitute grounds for recusal unless it is shown to have affected the result. Moreno, 70 N.Y.2d at 407 (citation omitted); see also, People v. Brown, 141 A.D.2d 657, 658 (2d Dep't 1988) (citing Moreno).

Plaintiff here alleges, with inflammatory accusations using a newspaper for support, that Judge Warhit "represented a co-defendant of the third Loja Brother" and should have recused himself. Plaintiff's convoluted chain of logic begins with two complaining witness (in the underlying criminal case against plaintiff) to a third brother (not associated with plaintiff's case) to a different defendant.

First, a co-defendant of a brother of a complaining witness has no relationship to Justice Warhit. Further, even if there was some tenuous connection, under New York Judiciary Law §14, a complaining witness is not a party to the criminal action and therefore does not fall within the statutory language necessitating mandatory recusal. People v. Griffiths 155 A.D.2d 777, 548 N.Y.S.2d 89 (3rd Dep't 1989) (citing, Griessman v. Fisher, 252 N.Y. 580, 581, 170 N.E. 151; People ex rel. Cooper v. Sheriff of Washington County, 208 App.Div. 823, 204 N.Y.S. 38).

Beyond that, plaintiff fails to demonstrate that the actions for which he attempts to sue Justice Warhit in this case are outside the scope of his judicial duties. They are not.

Justice Warhit should be dismissed from this action based on judicial immunity.

POINT III

PLAINTIFF FAILS TO STATE A CAUSE OF ACTION AGAINST KEVIN BARBELET.

Plaintiff now attempts to hold Kevin Barbalet in this action by use of the "affirmative duty to intervene" doctrine. It is true that a law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers. See O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir.1988) (excessive force); Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir.1986) (excessive force); Webb v. Hiykel, 713 F.2d 405, 408 (8th Cir.1983) (excessive force); Bruner v. Dunaway, 684 F.2d 422, 426 (6th Cir.1982), cert. denied, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983) (excessive force); Byrd v. Brishke, 466 F.2d 6, 10-11 (7th Cir.1972) (excessive force); Skorupski v. County of Suffolk, 652 F.Supp. 690, 694 (E.D.N.Y.1987) (excessive force). Plaintiff fails to allege that Kevin Barbelet witnessed anything triggering a duty to intervene.

Plaintiff asserts his "knowledge by familial association" theory by alleging that Kevin Barbalet is a detective sergeant and brother to John Barbalet and therefore he "must have known of the circumstances surrounding plaintiff's false arrest and malicious prosecution." A police officer can only be liable for a false arrest that occurs outside of his presence if he "had reason to know" that such a false arrest was likely to occur. Anderson v. Branen, 17 F.3d 552, 557 (2d Cir.1994).

Plaintiff does not allege that Kevin Barbalet was physically present when plaintiff was arrested. He also fails to allege when – or even *if* – Kevin Barbelet learned of plaintiff's arrest.

The Court should not sanction plaintiff's cause of action against Kevin for having the last name Barbelet.

POINT IV

THE INTRA-CORPORATE CONSPIRACY DOCTRINE APPLIES AND IS SUPPORTED BY THE ALLEGATIONS IN PLAINTIFF'S COMPLAINT.

Plaintiff's conspiracy claims are barred by the "intracoporate conspiracy doctrine." "The intracorporate conspiracy doctrine posits that the officers, agents, and employees of a single corporate or municipal entity, each acting within the scope of his or her employment, are legally incapable of conspiring with each other." Rodriguez v. City of New York, No. 05 Civ. 5117(JFB), 2008 WL 420015, at *25 (E.D.N.Y. 2005) (internal citation omitted); accord Herrman v. Moore, 576 F.2d 453, 459 (2nd Cir. 1978) ("[T]here is no conspiracy [under § 1985] if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own ... officers[ ] and employees, each acting within the scope of his employment."); Cameron v. Church, 253 F.Supp.2d 611, 623 (S.D.N.Y. 2003); see also Albiero v. City of Kankakee, 122 F.3d 417, 420 (7th Cir. 1997) ("A municipality acts only through agents, and that these agents have agreed (= 'conspired') on a course of action does not present a constitutional problem.").

Plaintiff fails to plead that anyone other than the "police defendants" was involved in the conspiracy:

> 27. That **each and all police defendants** conspired "for the purpose of impeding, obstructing or defeating. . . the due course of justice" as it pertained to plaintiff and".., to injure [plaintiff] or his property for lawfully enforcing, or attempting to enforce, [plaintiff's right]. . . to the equal protection of laws." 42 U.S.C. §1985(2).
>
> 28. That in bringing trumped up, false charges against plaintiff McGuire, **the police defendants** herein perverted our system of justice in exactly the manner foreseen by the drafters of the statute, and deserves redress under the statute as such.

Complaint ¶ 27, 28 (emphasis added).

The complaint clearly depicts the arrest and malicious prosecution conspiracy of "the police defendants" as the product of "a single corporation acting exclusively through its own directors, officers, and employees ...." Herrman, 576 F.2d at 459 (affirming the dismissal of a conspiracy claim under § 1985(3)).

Without having pled any facts to support his claim, plaintiff now avers that the officers had an "independent personal stake" in his arrest and prosecution. In order to succeed plaintiff must plead that "the individual defendants were motivated by an [ ] independent personal stake in achieving the corporation's objective" rather than "merely carrying out the corporation's managerial policy." Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 71 (2nd Cir. 1976) (internal quotation marks and citations omitted); see, e.g., Bhatia v. Yale Univ., No. 06 Civ. 1769(SRU), 2007 WL 2904205, at *2 (D.Conn. 2007) ("An exception applies where the plaintiff can demonstrate the employees were acting in their personal interests, wholly and separately from the corporation.") (internal citations omitted). The complaint does not support such a claim.

Thus, this Court should dismiss plaintiff's conspiracy claims.

CONCLUSION

For the reasons set forth herein, defendants respectfully request that the Court grant the instant motion, with costs, disbursements, and such other and further relief as to this Court is just, proper, and equitable.

Dated: Mineola, New York
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